

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 30, 2008

STATE OF TENNESSEE v. JESSEE LEE CANTER

Appeal from the Criminal Court for Sullivan County
No. S52,102 Robert H. Montgomery, Jr., Judge

No. E2008-00077-CCA-R3-CD - Filed October 29, 2008

The defendant, Jessee Lee Canter, was convicted on his no contest plea of aggravated assault, a Class C felony, evading arrest, a Class E felony, and driving on a revoked license after driving privileges have been revoked for a second or subsequent conviction of driving under the influence, a Class A misdemeanor.¹ See T.C.A. §§ 39-13-102 (2006) (aggravated assault); 39-16-603 (2006) (evading arrest); 55-50-504 (2004) (amended 2007) (driving on a revoked license). The trial court sentenced the defendant to serve six years in the Department of Correction as a Range I offender for aggravated assault, two years of probation as a Range I offender for evading arrest, and six months in jail with forty-five days to serve before release on probation for driving on a revoked license. The sentences for the felony convictions were imposed consecutively, and the driving on a revoked license conviction was imposed concurrently with the aggravated assault conviction. In this appeal, the defendant contends that the trial court erred in imposing incarceration for the aggravated assault conviction. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and CAMILLE R. MCMULLEN, JJ., joined.

Stephen M. Wallace, District Public Defender, and Richard A. Tate, Assistant Public Defender, for the appellant, Jessee Lee Canter.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Kent L. Chitwood, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

¹ As part of the plea agreement, a count charging evading arrest was dismissed, and counts charging driving on a revoked license and second offense driving on a revoked license were merged with the conviction for driving on a revoked license after revocation of driving privileges for a second or subsequent conviction of driving under the influence.

OPINION

The State's recitation of facts at the defendant's plea hearing was as follows:

The State's proof in S52,102 would be that on May 11th, 2006 the members of the Sullivan County Sheriff's Office, Bristol Tennessee Police Department, Bristol Virginia Police Department, had a roadblock at State Street and Volunteer Parkway in Bristol, Sullivan County, Tennessee. They noticed that a certain vehicle approaching that intersection on Volunteer Parkway going north toward Virginia was stopped short of the roadblock turn onto Shelby Street or made a u-turn on Shelby Street and go the other way. Officer Ray Hayes and Paul Bell were dispatched to Shelby Street to intercept these individuals trying to elude the roadblock. Officer Ray Hayes noticed the defendant traveling north on Volunteer Parkway. He decelerated from about 35 miles per hour to about 5 miles per hour there at the intersection of Shelby Street and Volunteer Parkway when it appeared he had noticed the roadblock at State Street and Volunteer Parkway. Officer Ray Hayes was at that intersection of Shelby Street and Volunteer Parkway with his cruiser, the lights were on, he was wearing an illuminated safety vest, this was at nighttime, that he was wearing his vest. He also had a flashlight with a red cone above it and was clearly visible to any oncoming traffic for his safety and to instruct them as to what to do. He saw the individual, he decelerated to 5 miles per hour, he noticed the individual looking around, it appeared that the individual was trying to decide what to do. The individual turns onto Shelby Street in the oncoming traffic lane, the wrong lane for his travel on Shelby Street, which was the lane that Officer Ray Hayes was standing in. He approached; he started driving towards Officer Ray Hayes. Officer Ray Hayes, standing in front of the car with his vest, his flashlight and then the defendant accelerated from 5 miles per hour towards Officer Hayes. At the last minute Officer Hayes jumps out of the way, the defendant swerves the vehicle into the correct lane, proceeds down Shelby Street for about four blocks, eventually turns onto Seventh Street, still in Tennessee, and abandons his vehicle. Officer Hayes, Officer Bell proceed to that location; witnesses including the defendant's passenger, identify the defendant as the individual driving the car and that he had fled from the vehicle. Officer Ray Hayes goes to a parking lot in close proximity to the vehicle, finds the defendant, the defendant admits that he was revoked. He was taken back to his vehicle. He tells Ms Tilson he's sorry about all of this and then he denies that he was driving repeatedly but eventually once he's in the

cruiser being taken to the jail he admits, or states to the officer he didn't intend to run the officer over.

The State would introduce a copy of, a certified copy of his prior driving on revoked conviction from May 5th, 2001. The State would also introduce two certified copies of driving under the influence convictions for May 5th, 2001 and April 19th, 1993, both out of Sullivan County; one from the Criminal Court and one from the General Sessions Court. . . .

. . .

[The defendant's driving privileges are revoked in Tennessee]
. . . and we do have a certified copy of that as well.

At the sentencing hearing, neither party presented proof other than the State's introduction of the defendant's presentence report. The report reflected that the forty-year-old defendant told the presentence officer that he was drinking heavily and smoking crack at the time of the offenses. The defendant stated that he desired probation in order to obtain assistance with his addiction and to keep his job and pay his fines. The report reflected that following the defendant's commission of these offenses, he had been charged with and convicted of domestic violence, two counts of possession of narcotic equipment, failure to appear, and driving on a revoked license. The defendant's criminal history included numerous convictions of public intoxication, driving under the influence, and driving on a revoked license. He also had prior convictions for failure to appear, trespass, larceny, and secreting the property of another. He had pending charges in Virginia for two counts of shoplifting allegedly occurring after the present offenses. He had prior probations revoked in 1995 and following the present offenses. The defendant's criminal history spanned his entire adult life, and he reported a juvenile history of truancy. The defendant was incarcerated and therefore unemployed at the time of sentencing, but he reported sporadic employment as a plumber's helper, a temporary laborer, a forklift operator, and in employed and self-employed construction work.

At the outset of the sentencing hearing, the trial court acknowledged the relevant factors and considerations. After hearing the parties' arguments and reviewing the presentence report, the court afforded substantial enhancing weight to the defendant's substantial history of criminal behavior and convictions, the defendant's failure to comply with conditions of a sentence involving community release, and the defendant's lack of hesitation to commit the offenses when the risk to human life was high. See T.C.A. § 40-35-114(1), (10), (13) (2006). The court found that no mitigating factors applied. The trial court noted that although the defendant stated to the probation officer who prepared the presentence report that he was smoking crack on the evening of the offense, the defendant was field tested and determined not to be under the influence at the scene. The court concluded that the defendant's actions in committing the offenses were fairly characterized as intentional, rather than reckless. In imposing incarceration for part of the overall sentence, the court noted that the defendant had been given the opportunity for various forms of alternative sentencing

in the past but that he had not availed himself of the opportunity to reform his conduct. The court also found that the defendant had not shown that he had “special needs,” as would be required for placement in the community corrections program. See T.C.A. § 40-36-106(c) (2006). The court also concluded that the defendant was deserving of consecutive sentencing because he was a dangerous offender and had an extensive record of criminal activity. With respect to its dangerous offender finding, the court noted that an extended sentence was necessary to protect the public from the defendant and that the length of the sentence reasonably related to the severity of the offense.

The issue presented on appeal is whether the trial court erred in imposing a sentence of confinement for the aggravated assault conviction. The defendant argues that he should have received an alternative sentence because his criminal history consists entirely of misdemeanors except for one felony driving under the influence conviction, measures less restrictive than confinement have not been applied frequently, and incarceration is not necessary to avoid depreciating the seriousness of the offense. The State responds that the trial court did not err.

Appellate review of misdemeanor sentencing is de novo on the record with a presumption that the trial court’s determinations are correct. T.C.A. §§ 40-35-401(d), -402(d) (2006). This presumption of correctness is conditioned upon the affirmative showing that the trial court considered the relevant facts, circumstances, and sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to section 40-35-401(d) note, the burden is now on the appealing party to show that the sentence is improper.

When determining if confinement is appropriate, the trial court should consider whether (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. T.C.A. § 40-35-103(1)(A)-(C) (2006). The trial court may also consider a defendant’s potential or lack of potential for rehabilitation and the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. §§ 40-35-103(5) (2006), -210(b)(5) (2006); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed. T.C.A. § 40-35-103(4).

When a defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony, the defendant should be considered as a favorable candidate for alternative sentencing in the absence of evidence to the contrary. T.C.A. § 40-35-102(6) (2006). Such a consideration may be overcome by the State with “evidence to the contrary.” Id.

The record reflects that the trial court considered the relevant facts and circumstances, as well as the principles of sentencing. The court was influenced by the defendant’s long, abysmal history in the criminal justice system, including numerous past driving offenses, and the seriousness of the present offenses, given the evidence of the intentional nature of the defendant’s conduct. The court

also noted that the defendant had been given many past opportunities for improvement through various types of sentencing, yet the defendant remained undeterred from unlawful conduct. We conclude that the State offered ample “evidence to the contrary” that overcame any consideration that the defendant was a favorable candidate for alternative sentencing for his aggravated assault conviction. The trial court did not err in imposing incarceration for this conviction.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE